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No. _____

In The

Supreme Court of the United States

October Term, 1981

ROBERT F. PARRATT, Warden,

Petitioner,

vs.

JESSE J. FORD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Was the judgment of the Circuit Court in conflict with the applicable decisions of this Court when it granted a writ of habeas corpus to an inmate who plead guilty to a charge of rape in the state court when represented by counsel who had not yet investigated the rumored pregnancy of the victim, *i. e.*,

1. Did the Circuit Court fail to give a presumption of regularity to the decisions of the lower courts?
2. Did the Circuit Court fail to give a presumption of correctness to the factual determinations of the state courts?
3. Did the Circuit Court impose a duty on petitioner's attorney to investigate a fact that was immaterial because it was not an element of the crime and not the reason for petitioner's guilty plea?
4. Did the Circuit Court fail to give vitality to the doctrine of harmless error?

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OPINIONS DELIVERED BY THE COURTS BELOW

1. United States Court of Appeals for the Eighth Circuit

   a. Decision on remand from the United States Supreme Court, filed March 15, 1982. Exhibit A.

   b. Order staying of mandate for sixty days from April 12, 1982. Exhibit B.

c. Opinion filed January 21, 1981, granting writ of habeas corpus and giving state time to retry petitioner. Exhibit C.

d. Judgment filed January 21, 1981. Exhibit D.

e. Order, filed February 20, 1981, denying motion for stay of mandate. Exhibit E.

f. Order, filed February 20, 1981, denying petition for rehearing and suggestions for rehearing en banc. Exhibit F.

g. Order, filed April 13, 1981, recalling and staying its mandate, pending filing of petition for certiorari on or before May 1, 1981. Exhibit G.

2. United States District Court for the District of Nebraska

a. Memorandum opinion filed June 11, 1980, finding petitioner's petition for a writ of habeas corpus should be denied. Exhibits H.

b. Order, filed June 11, 1980, dismissing the petition for a writ of habeas corpus. Exhibit I.

3. The Supreme Court of the State of Nebraska

a. *State v. Ford,* 198 Neb. 376, 252 N.W.2d 643 (1977), vacating the order of the district court dismissing Ford's application for post conviction relief and remanding case with directions to grant an evidentiary hearing on Ford's motion to vacate and set aside his sentence. Exhibit J.

b. *State v. Ford,* 200 Neb. 779, 265 N.W.2d 456 (1978), affirming the judgment of the District

Court of Dakota County, Nebraska, that petitioner had entered his plea voluntarily and understandingly and had been represented by competent counsel through the original proceedings. Exhibit K.

4. The District Court of Dakota County, Nebraska

— Findings in the case of *State v. Ford*, Case No. 9107, and order denying defendant's motion for post conviction relief after an evidentiary hearing on whether Ford's plea was voluntarily and understandingly entered. Exhibit L.

5. Supreme Court of the United States

a. Order of Justice Harry A. Blackmun, filed April 10, 1981, that the mandate of the United States Court of Appeals for the Eighth Circuit be recalled and stayed pending the filing and disposition of a petition for a writ of certiorari. Exhibit M.

b. Order of this Court filed October 19, 1981, granting the petition for writ of certiorari, vacating the judgment of the United States Court of Appeals for the Eighth Circuit and remanding the case to that court for further consideration in light of *Sumner v. Mata*, 449 U.S. 539 (1981). Exhibit N.

GROUNDS FOR JURISDICTION

1. On March 15, 1982, the United States Court of Appeals for the Eighth Circuit entered judgment in the case of *Jesse J. Ford v. Robert Parratt, Warden*, No. 80-

1561, on remand from the United States Supreme Court. Exhibit A.

2. No request was made for a rehearing. A request was made for a stay of the mandate which was granted for sixty days from April 12, 1982. Exhibit B.

3. 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review the judgment of the Circuit Court in this case if a petition for certiorari is filed within ninety days of the judgment as required by 28 U.S.C. § 1201(c). Thus this Court will have jurisdiction of this case if this petition for certiorari is filed on or before June 14, 1982. The mandate of the Circuit Court will be stayed until the final disposition of the case by this Court if this petition for certiorari is filed on or before June 11, 1982, and a certification of the Clerk of this Court of that fact is filed by that date with the Clerk of the Circuit Court.

4. There are special and important reasons this Court should grant a writ of certiorari in this case because the United States Court of Appeals for the Eighth Circuit has decided important questions of federal law in conflict with applicable decisions of this Court. Rule 17.1(c) of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

1. *Sixth Amendment to the United States Constitution*

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

2. *Fourteenth Amendment to the United States Constitution*

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . .

3. 28 U. S. C. § 2254

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

4. Neb. Rev. Stat. § 28-408 (Supp. 1974)

Whoever shall have carnal knowledge of any other woman, or female child, than his daughter or sister, as aforesaid, forcibly and against her will . . . shall be deemed guilty of rape. . . .

STATEMENT OF THE CASE

This action originated as an application for a writ of habeas corpus under 28 U. S. C. § 2254 by a person imprisoned in the Nebraska Penal and Correctional Complex under the laws of the State of Nebraska after he pled guilty to a charge of rape.

On October 19, 1981, this Court in *Parratt, Warden v. Ford, Jesse,* No. 80-1816, directed the United States

Court of Appeals for the Eighth Circuit to reconsider this case in light of *Sumner v. Mata*, 449 U.S. 539 (1981). It vacated the circuit court's decision in *Ford v. Parratt*, No. 80-1561 (January 21, 1981).

In that decision, without specifying on which subsection of 28 U.S.C. § 2254(d) it was relying, the circuit court on review of the state court record reached a different conclusion than the state court on the two ultimate issues: (1) Were any threats or promises made to induce Ford to plead guilty so his plea was not voluntary? (2) Did he have effective assistance of counsel? Exhibit C.

The state court had found that no threats or promises had induced Ford's guilty plea and that he had had effective assistance of counsel. It refused to vacate his conviction for rape. Exhibit L. The circuit court held that the rumored pregnancy of the complaining witness was used as a threat so his attorney had a duty to determine the truth of the rumor before he let Ford plead guilty. It held his failure to do so prejudiced Ford, thus denying him effective assistance of counsel. It reversed the district court's denial of a writ, giving the state a chance to retry him or let him plead guilty. Exhibit C.

Now the circuit court says that the reason it reached different conclusions on the ultimate facts is that "the merits of the factual dispute with respect to incompetency of Counsel were not resolved in the state court hearing." Exhibit A.

The parties had submitted this case on the record of the post conviction evidentiary hearing in the state district court. That evidentiary hearing was ordered by the Nebraska Supreme Court in *State v. Ford*, 198 Neb. 376,

252 N.W. 2d 643 (1977), because the record of Ford's arraignment did not affirmatively show that his plea to the charge of rape in 1974 had been entered voluntarily. (When Ford was asked if anyone had offered him anything or made any promises or threats to him to get him to plead guilty, Ford did not answer the question because the prosecutor interrupted with the terms of the plea bargain. Those terms were that in exchange for Ford's plea of guilty to the rape charge the state would dismiss two counts of kidnapping and two counts of robbery, would make no recommendation with regard to sentencing and would not oppose reduction of his bond.)

The post conviction evidentiary hearing was held in state district court on September 14, 1977. Testimony was given by Ford, his wife, mother, sister, aunt, husband of his cousin, his attorney at the arraignment and the partner of that attorney. References below are to the Bill of Exceptions from that hearing unless otherwise indicated.

Ford testified that if the judge asked him now if any promises or threats had been made to get him to plead guilty he would tell him that he was promised if he didn't plead guilty he would end up with five fifty year sentences back to back "and that I was under duress because they told me the girl was pregnant. I was told that by two different people that I was going to get time because I was black and because I was big." Thus he didn't feel that his plea was voluntary (58:8-15).

Ford testified, "I plead guilty because I thought I would get two years in the Nebraska Penal Complex." (60:25-61:1).

Ford testified that on the day of his arraignment, after his family was asked to leave the room, he had been told that somebody had told his attorney's partner the girl was pregnant. He said his response was, "Well, if she's pregnant that's in my favor 'cause I didn't impregnate the lady." He said his attorney told him that "they'd give her an abortion and, looking at me, 'cause I'm black and big; big and black, the jury would automatically convict me whether I was guilty or not." (53:8-16).

He testified that up until that conversation he had resisted any attempt to plead guilty. His attorney asked him, "what made you change your mind?" Before Ford could answer, his attorney at the hearing interrupted him to inquire whether his attorney at his arraignment had told him anything about the complaining witness' physical condition. Ford said he'd told her that the young lady was pregnant and they spoke about an abortion. "I felt that if she was pregnant it was in my favor." (54:5-21).

Ford's wife testified that on the day of the arraignment she was in a conference with her husband, family members and his attorneys. At one point she was asked to leave. She said when she left he was not going to plead guilty. When she came back in the room he told her he was going to plead guilty. He said his attorney's partner had come back and told his attorney the girl was pregnant. Ford told her, "They'll hang me if I plead not guilty." (36:18-40:1).

The other members of Ford's family testified to sitting in on a conference between Ford and his attorney and being asked to leave for a few minutes.

Ford's attorney testified that although Ford never told him he did not wish to plead guilty, he assumed Ford did not wish to plead guilty. As a matter of defense strategy, they discussed plea bargaining without making that their sole alternative "and, at no time until we plead guilty, did we abandon the possibility of defending the case on a not guilty plea." (178:4-19).

Ford's attorney testified that in the course of the investigation of the matter by him and his partner and in the course of dealing with the county attorney's office regarding the charges against Ford, his partner had been advised that the parents of the alleged rape victim believed their daughter to be pregnant. When his partner told him, he told Ford "in the course of our conversations regarding the strategy of the case." (12:6-15). He told Ford this prior to the day of his arraignment (77:5-12).

The rumored pregnancy of the complaining witness was discussed with Ford in private. His attorney told him he didn't have to tell his wife about it since it was only a rumor. He didn't see the need to burden her with the possibility when it was not substantiated (72:10-73:4).

Ford's attorney was asked: "Do you feel that fact alone had any effect on the decision of the Defendant to . . ."

> A. Well, it was part of the over-all picture of the whole thing. We had to communicate it to the Defendant and advise him that if [sic] was unsubstantiated and as we would go to trial we would nail it down one way or the other. But, at that point, it was how it was and it was given to him to use along with all the other bits of information that he had

and that we had acquired through our investigations and the County Attorney's Office. It was given to him to reach a defense strategy. I don't think it was a major factor, at least in my awareness, in any decision that was made.

(73:7-16).

Ford's attorney was asked:

Q. Well, there has been some strong implications here that something went on during the period of time when the family was excluded from these conferences; something that drastically changed the complexion of this case. What is your statement to that?

A. No. There was nothing that was ever said as far as adding anything material that would change the complexion of the case.

(71:20-72:2).

Q. And, in your opinion, did the Defendant enter his plea of guilty to the charge, on August 29th, 1974, of his own decision without respect to any comments of his wife or any other person?

A. I can't honestly say that it was his sole decision. He discussed it with his wife and family and he discussed it with me. He made the decision then as whether to accept it or reject it in his own mind and I'm sure that it was in the framework of the consultations with both family and counsel.

(75:1-9).

The state district court refused to vacate his sentence and grant him a new trial. It found Ford had entered his plea voluntarily and understandingly and he had been represented by competent counsel throughout the original proceedings. *See,* Exhibit L. At the hearing on Ford's motion for a new trial, the court explained the reason for its decision:

> [A]s is often the case where two parties come into court and have absolutely divergent testimony as to the events that have taken place, what it really boils down to is the credibility of the witnesses. I did have the opportunity to view them and to weigh the credibility of the witnesses as I saw them testify. That is the reason for the decision I made in this case. The Motion for New Trial is overruled. . . .

(85:13-21).

When Ford appealed that decision to the Nebraska Supreme Court it found that the record supported the finding of the district court that Ford's plea of guilty was understandingly and voluntarily made and not induced by threats and promises. It held that the record established that the defendant was represented by competent counsel throughout the original proceedings. It affirmed the judgment of the district court. *State v. Ford*, 200 Neb. 779, 265 N.W. 2d 456 (1978). Exhibit F.

On the same record, the federal district court held in *Ford v. Parratt*, CV78-L-209 (June 11, 1980), "that the state post-conviction court's finding that no promises or threats were made is entitled to a presumption of correctness and that Ford has not shown this finding to be erroneous." Exhibit D.

It found Ford's principal argument to be properly before it. That was that his trial attorney was ineffective in not conducting an investigation into the rumored pregnancy of the victim before allowing Ford to plead guilty to rape. It held Ford had not proved that his counsel was ineffective. "[T]he petitioner has not only failed to show that an investigation would have established that the victim was not pregnant, but also how the

nonpregnancy of the victim would have aided him in defending the charge of rape." It denied the writ of habeas corpus. Exhibit D.

Ford appealed that decision to the United States Court of Appeals for the Eighth Circuit. In *Ford v. Parratt*, No. 80-1561 (January 21, 1981), that court reversed the decision of the district court and remanded the case to the district court with instructions to order defendant's judgment and sentence vacated and to order the state attorney general's office, within 120 days, either to schedule the case for trial or allow defendant to enter a proper plea of guilty. It held Ford's guilty plea was entered without effective assistance of counsel because his attorney had not investigated the rumored pregnancy which it found to be the trigger for his guilty plea. It found that Ford's attorney had used that rumor as a tool to force Ford to plead guilty. It found the truth or falsehood of that rumor was therefore a "material fact" even though it was not an element of the crime with which Ford was charged and Ford was prejudiced because it was not investigated. Exhibit C.

This Court granted respondent's Petition for Certiorari in *Parratt v. Ford*, No. A-817. In summary disposition of case No. 80-1816 (October 19, 1981), it reversed the decision of the Eighth Circuit and remanded the case for further consideration consistent with *Sumner v. Mata*, 449 U. S. 539 (1981). Exhibit N.

After reconsidering the matter, the circuit court filed another opinion in *Ford v. Parratt*, No. 80-1561 (March 15, 1982). In it the court essentially underlined what it had said before, citing 28 U. S. C. § 2254(d)(1) as the jus-

tification for it reaching different conclusions than the state court because "it appears from the record that the merits of the factual dispute with respect to incompetency of counsel were not resolved in the state court hearing." Exhibit A. It modified its previous order only to instruct the district court:

> [To] remand the matter to the state court to give that court the opportunity, if it wishes, to make specific findings and conclusions with respect to whether the appellant received effective assistance of counsel with respect to his plea of guilty and to transmit those findings to the district court within 120 days from the date that the district court enters its order of remand. If it makes such findings, the appellant can then renew his habeas motion in federal court. If not, then the United States District Court shall order the defendant's judgment and sentence vacated.

Exhibit A.

The circuit court has stayed its mandate until June 11, 1982, to give the respondent a chance to seek review of its decision by this Court on a Petition for Certiorari. Exhibit B.

ARGUMENT

I.

The opinion of the Circuit Court is inconsistent with the holding of this court in Sumner v. Mata.

This Court reversed the judgment of the United States Court of Appeals for the Eighth Circuit in this

case, and directed it to reconsider the matter in light of *Sumner v. Mata*, 449 U.S. 539 (1981).

This Court recognized in *Sumner v. Mata* the inevitable friction likely when a writ is issued on the behest of a petitioner under 28 U.S.C. § 2254, effectively overturning either the factual or legal conclusions reached by the state court system under the judgment of which the petitioner stands convicted. It acknowledged the intent of Congress to minimize that friction by establishing "that the findings made by the state court system 'shall be presumed to be correct' unless one of seven conditions specifically set forth in § 2254(d) was found to exist by the federal habeas court" or the Court concludes the relevant state determination is not fairly supported by the record. This Court held: "[A] habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.'" *Supra* at 734.

The circuit court has attempted to comply with that case by finding that the condition set forth in 28 U.S.C. § 2254(d)(1) is applicable to this case. That is, "that the merits of the factual dispute with respect to the competency of counsel were not resolved in the state court hearing." It has ordered the case remanded to the state court so the dispute can be resolved.

It is apparent from the circuit court's opinion and from its order to remand the case to the state court that it perceives that "factual dispute" to be the issue which was not presented to the state courts before it was de-

cided by the federal courts in this habeas corpus action, *i.e.*, whether Ford was denied effective assistance of counsel because his attorney did not investigate the rumored pregnancy of the victim before Ford plead guilty. However, the fact that he didn't do so is not in dispute, only whether he had a duty to do so. The parties agreed the state court record was sufficient on which to base a decision of whether Ford had ineffective assistance of counsel because his attorney didn't investigate the rumored pregnancy before Ford pled guilty.

The circuit court in this case found the duty of Ford's attorney to investigate the rumored pregnancy arose from a factual finding by the circuit court overturning a factual finding reached by the state court. That is, the circuit court found the rumored pregnancy of the victim was a significant fact which had to be investigated by Ford's attorney only because it found, contrary to the state court, that the rumor was used as a tool to force Ford to plead guilty. It follows from the circuit court's analysis that if, as the state court found, no threats or promises were used to induce Ford to plead guilty, his attorney had no duty to investigate the rumored pregnancy of the complaining witness.

Under *Sumner v. Mata*, when the circuit court overruled the state court finding on the factual issue of whether threats or promises were used to induce Ford's guilty plea, it had a duty to justify its finding by one of the seven factors set forth in § 2254(d) or by reasoning which led it to conclude the state finding was not fairly supported by the record. It has chosen to do so by citing § 2254(d)(1).

The factual dispute here is not one where the merits were left unresolved in the state court, but the very one between the circuit court and the state court which obligated the circuit court to justify its overruling of the state court finding. Section 2254(d)(1) is thus inapplicable and citing it does not fulfill the requirements of *Sumner v. Mata.*

II.

The judgment of the Circuit Court was in conflict with the decision of this court in Johnson v. Zerbst.

Johnson v. Zerbst, 304 U. S. 458 (1937), was a *habeas corpus* proceeding in which the petitioner claimed his guilty plea was not voluntarily and intelligently made because he was not represented by counsel at the time and had not waived his right to be represented by counsel.

The district court in that case had held that proceedings denying petitioner his constitutional right in assistance of counsel were not sufficient "to make the trial void and justify its annulment in a habeas corpus proceeding, but that they constituted trial errors or irregularities which could only be corrected on appeal." The circuit court affirmed. This Court granted *certiorari* to determine the scope of review in *habeas corpus* proceedings. It held: "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of Counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a Federal court's authority to deprive an accused of his life or liberty."

Supra at 467. "It must be remembered, however, that a judgment can not be lightly set aside by collateral attack, even on *habeas corpus*. When collaterally attacked, the judgment of a court carries with it a presumption of regularity." *Id.* at 468.

It can hardly be argued that the circuit court has given the judgments of the state courts such a presumption of regularity in the present case. Instead, the circuit court looked at the facts *de novo* and reached its own conclusion, contrary to that of the state court on the same issue and same record. That is, it *inferred* that Ford pled guilty because of the rumored pregnancy of the rape victim, not because he wanted to get a lesser sentence as Ford himself testified. On the identical record before the state courts it substituted its judgment that an inference it drew outweighed conclusions of the state court supported by the record.

This does not even meet the preponderance of the evidence burden stated in *Johnson v. Zerbst,* above, at 469. Now, as this Court stated in *Sumner v. Mata,* above, by enacting 28 U. S. C. § 2254(d) "Congress meant to insure that a state finding not be overturned merely on the basis of the usual 'preponderance of the evidence' standard in such a situation." *Supra* at 734.

Petitioner asks this Court to grant a writ of *certiorari* in this case to review a decision of the circuit court which failed to give a presumption of regularity to the judgments of the state courts and is therefore in conflict with decisions of this court.

III.

The finding of the Circuit Court that Ford did not have effective assistance of counsel when he pled guilty was not consistent with decisions of this court.

In *Tollett v. Henderson*, 411 U.S. 258 (1973), this Court reaffirmed its prior holding:

> When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann [McMann v. Richardson, 397 U.S. 759 (1970)].

Supra at 267.

In *McMann v. Richardson*, 397 U.S. 759 (1970), this Court recognized that the duty owed to the accused by his attorney may vary, depending on whether the client pleads guilty or not guilty.

> A conviction after a plea of guilty normally rests on the defendant's own admission in open court that he committed the acts with which he is charged.

Supra at 766.

> That admission may not be compelled, and since the plea is also a waiver of trial—and unless the applicable law otherwise provides, a waiver of the right to contest the admissibility of any evidence the State might have offered against the defendant—it must be an intelligent act "done with sufficient awareness of the relevant circumstances and likely consequences."

> Brady v. United States, 397 U.S. at 748, 25 L. Ed. 2d at 756.

Id. at 766.

> [T]he decision to plead guilty before the evidence is in frequently involves the making of difficult judgments. All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court. Even then the truth will often be in dispute. In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. Counsel must predict how the facts, as he understands them, would be viewed by a court. If proved, would those facts convince a judge or jury of the defendant's guilt? . . . Waiving trial entails the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what a court's judgment might be on given fact. • • •
>
> That a guilty plea must be intelligently made is is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing.

Id. at 769, 770.

Ford in this case admitted in open court that he had raped the complaining witness. His attorney made some investigation of the case prior to Ford's arraignment but he did not actually determine whether the rumor was true that the complaining witness was pregnant.

> Well, it was part of the over-all picture of the whole thing. We had to communicate it to the Defendant and advise him that if [sic] was unsubstantiated and as we would go to trial we would nail it down one way or the other. But, at that point, it was how it was and it was given to him to use along with all the other bits of information that he had

> and that we had acquired through our investigations and the County Attorney's Office. It was given to him to reach a defense strategy. I don't think it was a major factor, at least in my awareness, in any decision that was made.

(73:7-16).

Ford's attorney testified that "we, as a matter of defense strategy, discussed plea bargaining without making that our sole alternative and, at no time until we plead guilty, did we abandon the possibility of defending the case on a not guilty plea." (78:16-19).

When asked if he thought Ford entered his guilty plea "without respect to any comments of his wife or any other person," his attorney answered:

> I can't honestly say that it was his sole decision. He discussed it with his wife and family and he discussed it with me. *He made the decision* then as whether to accept it or reject it in his own mind and I'm sure that it was in the framework of the consultations with both family and counsel."

(Emphasis added.) (75:1-9).

In this case Ford has tried to show that his counsel was ineffective because he did not determine prior to Ford's arraignment whether the rumor was true that the complaining witness was pregnant.

Such evidence was immaterial because it was not an element of the crime of rape. It should therefore have been inadmissible. Accordingly, his attorney had no duty to investigate whether the victim was pregnant and his failure to do so did not prejudice Ford. As this Court said in *Tollett*, above, at 267, 268:

> A guilty plea, voluntarily and intelligently entered, may not be vacated because the defendant . . . [has] show[n] that if counsel had pursued a certain factual inquiry such a pursuit would have uncovered a possible constitutional infirmity in the proceedings.
>
> The principal value of counsel to the accused in a criminal prosecution often does not lie in counsel's ability to recite a list of possible defenses in the abstract, nor in his ability, if time permitted, to amass a large quantum of factual data and inform the defendant of it. Counsel's concern is the faithful representation of the interest of his client, and such representation frequently involves highly practical considerations as well as specialized knowledge of the law. Often the interests of the accused are not advanced by challenges that would only delay the inevitable date of prosecution.

The facts from the state court in this case support a finding that Ford's attorney successfully negotiated a plea bargain that in exchange for a plea of guilty by Ford to the charge of rape, the county attorney would drop the robbery and kidnapping charges but would make no recommendation about what sentence should be imposed. They support a finding that Ford himself made the decision to plead guilty after consultation with his family and attorney. They support a finding that the rumored pregnancy of the complaining witness was not used as a threat to induce him to plead guilty.

The finding of the circuit court, inferred from those same facts, that the possible pregnancy of the rape victim triggered Ford's decision to plead guilty, is counter to the finding of the state court and to Ford's own testimony. The court's characterization of the possible preg-

nancy of the victim as a "key factual issue" which defense counsel had a duty to investigate was based on that inference.

These findings of the circuit court and its conclusion that therefore Ford had ineffective assistance of counsel is counter to the standards in *McMann* and *Tollett*, above. Ford's counsel could hardly have anticipated that a reviewing court would find he had a constructive duty to investigate a fact which was not an element of the crime and which he probably could have kept out of the record if the case had proceeded to trial.

WHEREFORE, your petitioner prays that this Court issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eighth Circuit issued March 15, 1982, on remand of the case of *Ford v. Parratt*, No. 80-1561, October 19, 1981.

Respectfully submitted,

ROBERT F. PARRATT, Warden,
Petitioner,

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His Attorneys.